IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Nos. 53 and 175 (Consolidated).

CHAS. P. BARRETT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the Circuit and District Courts of the United States for the Districts of South Carolina.

PETITION AND BRIEF FOR REHEARING.

CHARLES C LANCASTER,
A. H. GARLAND,
JOHN L. McLAURIN.

LAW REPORTER PRINT

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STATEMENT.

Barrett was convicted of infamous offenses in two separate cases in the United States courts in South Carolina and sentenced, in the aggregate, to three years imprisonment and fines in the sum of $4,500, and prosecuted writs of error to the Supreme Court. They are Nos. 53 and 175 on the calendar for the October term, 1897.

The only legal questions presented by the record necessary for the purposes of this proceeding are as follows:

1. Does South Carolina constitute *two districts*, or only *one district*, containing *two divisions?*

2. Should the trial courts have compelled the Govern-

ment to elect on which one of the offenses it would rely for a conviction?

3. Should the record have shown affirmatively that a grand jury of not less than twelve, nor more than twenty-three men found the indictments?

They were argued together as one case just prior to the February recess—January 21, 1898—Mr. Justice McKenna only being absent. On reassembling after the recess—February 21, 1898—the court, speaking by Mr. Chief Justice Fuller, overruled all the objections, holding in substance—

1. That South Carolina constitutes "but *one district*, containing *two divisions*."

2. That the bill of exceptions does not contain the evidence and, therefore, the error imputed to the trial court in refusing to compel the election on the part of the Government could not be considered.

No mention was made of the question whether it was essential that the record should show that a grand jury of not less than twelve, nor more than twenty-three men found the indictment.

Judgments of affirmance were, therefore, entered in both cases and this petition for a rehearing is the consequence.

In this connection it may not be improper to observe that the petitioner is not unmindful of the wise and salutary rule that only in rare instances will a rehearing be granted in any case. But in the dim, distant past, this court, not arrogating to itself that impossible human attainment of infallibility, but, on the contrary, recognizing its capacity to err, made ample provision for correcting its own mistakes, from whatsoever cause committed, which has again and again been readopted and constitutes No. 30 of the present rules. But while this right will be cautiously, not to say sparingly, exercised, yet when a proper case is presented, this court will review its own decisions with as little hesitation as it will those of inferior courts over which it has appellate jurisdiction.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Chas. P. Barrett, plaintiff in error, prays for a rehearing of the two causes, above entitled, upon the grounds following, to wit:

1. Because mistake of law was committed in holding that by the local statutes relative to the judicial districts in South Carolina that State constitutes "but one district, containing two divisions," statutes and documents having been discovered since the judgments that were not accessible to court or counsel before, which demonstrate that there are two districts.

2. Because mistake of fact was committed by the court in holding that the evidence was not incorporated in the bill of exceptions, and, for that cause, declining to consider the assignment of error based on a refusal of the court below to compel the Government to elect on which one of the offenses it would rely for a conviction—the *facts*, and not the *evidence*, of them, being all that are necessary to be set forth in the exceptions.

3. Because error was committed in overlooking the fact that neither record shows that a grand jury of not less than twelve nor more than twenty-three men found the indictments.

Respectfully submitted.

CHARLES C. LANCASTER,
Counsel for Petitioner.

A. H. GARLAND,
JOHN L. McLAURIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I certify that, in my opinion, the petition for a rehearing is well founded in law.

CHAS. C. LANCASTER.

BRIEF AND ARGUMENT.

First Point.

South Carolina constitutes TWO DISTRICTS, *and not* ONE DISTRICT *Containing* TWO DIVISIONS.

I.

The point upon which plaintiff in error mainly relied before this court for a reversal of the judgments below was, that, under Article VI of the Constitutional Amendments and Secs. 563, 629 of the Revised Statutes passed in pursuance thereof, the court in the eastern district was without jurisdiction to find the indictments or to try the cases for offenses charged to have been committed in the western district. But this court, while conceding the law to be that an accused person cannot be legally indicted or tried in one district for an offense committed in another, held that South Carolina constitutes "but one *district*, containing two *divisions*." This point was, therefore, overruled and this petition challenges the correctness of that ruling.

"District" and "division" are well-defined terms. Their difference is world-wide. Relative to United States courts, they correspond very nearly with county and township in State courts. Practically, they bear the same relation of county and township, or city and ward. Division, as the name implies, is a *subdivision* of a district.

The words *division* and *district* are not interchangeable terms, you can say, a *division* of a *district*, but you can not say a *district* of a *division*. This is nonsense. A trial in the district where the offense has been committed is a substantial right, which can not be divested without impairing the constitutional safeguard of the citizen.

U. S. *vs.* Dawson, 15 How. 467.

U. S. *vs.* Jackalow, 1 Black. 484.

As before stated, while it is indispensable that one charged with crime must be indicted and tried in the district of its commission, there is no law, constitutional or statutory, requiring the indictment or trial to take place in the *division* of its occurrence. It follows, therefore, that if South Carolina constitutes but one district, containing two divisions, the judgment in this regard is correct; but if, on the other hand, that State composes two districts, the judgment is erroneous, and a rehearing should be awarded, to the end that the mistake be corrected. That they are *districts*, and not *divisions*, will be shown with as near approach to demonstration as anything short of mathematics will admit—if, indeed, it does not amount to actual demonstration itself.

That this court should have committed this mistake, discredits neither the legal ability nor the research of any of its members. Far otherwise. That the ablest jurists can know but little of the great body of the law, all admit. For the same reason that the State bench is not supposed to be familiar with the statutes of other States, or even the local statutes of its own State, without enlightenment from the bar, the Federal bench is not expected to possess intimate knowledge of local United States statutes; especially, as in this case, in the construction of an ambiguous statute enacted three-quarters of a century (February 21, 1823), and re-enacted a quarter of a century (June 22, 1874) ago. Nor, under the circumstances, should the industry and diligence of counsel be discounted for inability to properly advise the court in regard to the matter at the argument, for the information demonstrating that there are two districts has been discovered since the entry of the judgments by, as it would seem, a special Providence. The last will and testament of Chief Justice Chase would never have been adjudged void for having only two witnesses had he been properly advised that the local law of the

District of Columbia, unlike the statutes of Ohio, required three witnesses!

II.

There were two districts in South Carolina from February 21, 1823, down to June 22, 1874, the time of adopting the Revised Statutes.

By the Judiciary Act of September 24, 1789, South Carolina constituted one district. This remained the law till the passage of the Act of February 21, 1823 (3 Stat. 726), entitled, "An act to divide the *State* of South Carolina into two *judicial districts*" (not "geographical divisions"), when it was divided into two districts. The word "division" is nowhe e used, either in the title or body of the act. Since, then, "district" was a word of definite legal import, both by the Judiciary Act and other statutes, as well as by Article VI of the Constitutional Amendments, we are bound to presume, in the absence of a clear expression to the contrary, that it was used in that sense here.

In the very recent case of U. S. *vs.* Goldenberg, 168 U. S. 95, 102, this court, speaking by Mr. Justice Brewer, used this terse and pregnant language:

> "The general and primary rule of statutory construction is that the intent of the lawmaker is to be found in the language that he had used. He is presumed to know the meaning of words. The courts have no function of legislation, and simply seeks to ascertain the will of the legislator. True, there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are urgent reasons for believing that the letter does not fully and accurately disclose the intent."

From this period down to 1858, Congress passed divers acts whose sole object was to regulate the terms of the courts

in South Carolina, but in nowise affecting the districts, in which the words "South Carolina," "State of South Carolina," and "District of South Carolina," are indifferently used relative to the courts in that State. This, no doubt, is due, in part, to the slovenly manner in which legislators too frequently express themselves, but mainly because, since one judge, one district attorney, and one marshal acted as such for both districts, it was popularly supposed that there was but one district there and, in that way, Congress fell into that error. But it was *nowhere enacted* that there should be *but one district*, or that there was any *division*. Hence, it is illogical to conclude that such legislation formed one "district, with two divisions." Laws are made or unmade, not by bare *assumption*, but by *enactment*. Especially in view of the fact that by the Act of August 16, 1856 (11 Stat. 43), the *western district* was vested with circuit court powers. Whoever heard of a separate and distinct circuit court (*eo nomine*) being established in a division—a part— a subdivision—of a district, or a part or division of a district court being given circuit court jurisdiction, which, in law, is the same thing?

Ex parte Ins. Co., 18 Wall. 417.

Such legislation would inevitably establish two or more circuit and district courts in one district—an absurdity unknown to Federal legislation, and one which the courts will never presume Congress to have intended unless forced to do so by clear and unequivocal language—which language is conspicuously absent in this case.

True, opinions, legal and lay, differed respecting the districts and courts in South Carolina, and, while there is no judicial utterance to the effect that there are not two districts in that State, there is a circuit court decision rendered in 1871, in the Ku Klux trials (pp. 8, 9, 10), wherein it is ruled that the circuit court had jurisdiction over the whole

State. The opinion is guarded and carefully avoided holding that there is "but one district, containing two divisions." Besides, the question was not argued by a member of the South Carolina bar, but by a Baltimore lawyer (Reverdy Johnson) and decided by a Baltimore judge (Judge Bond) shortly after his accession to the bench, neither of whom could be expected to be familiar with the long history of the local legislation upon the interpretation of which the decision depended. In addition, at that time there was no writ of error allowed to the Supreme Court in such cases. But this decision was very unsatisfactory to the bar of South Carolina. So much so that shortly thereafter it provoked an elaborate and learned argument from Gen. Edward McCrady, an eminent Charleston (S. C.) lawyer, wherein he not only combats the views of the court in that case, but by a careful review and analysis of the authorities deduces the conclusion that there are two districts in South Carolina. It is published in the appendix to 3 Hughes Reports, 665, to a careful perusal of which this court is earnestly invited.

It is noteworthy that in the whole of the legislation, from the time of the Act of February 21, 1823, down to the adoption of the Revised Statutes, the word "division" in reference to the courts in South Carlina is not used once! It is "district" every time! How strange that this should have occurred, if it had been the intention of Congress to compose divisions instead of districts! Why use district if division is meant? Would it not have been quite as easy to use the proper as the improper word? Again, since division is incontrovertibly merely a subdivision—a part—of a district, the language of the Act of February 21, 1823, both in its title and body, is significant. It is "the *State* of South Carolina is divided into two *districts*," etc., and not the *district* of South Carolina is divided into two *divisions*. as was the case when, by the Act of July 7, 1838 (5 Stat. 295),

the Northern District of New York was divided into three divisions; and by the Act of March 3, 1859 (11 Stat. 437), the district of Iowa was divided into four divisions.

So much for the state of the law in South Carolina in relation to districts and courts at the time of the adoption of the Revised Statutes of the United States—June 22, 1874—from which it would seem that it has been indubitably established that there were then two districts in the State.

III.

The Revised Statutes Re-enacted the previous Legislation Dividing South Carolina into Two Districts.

The decision in this case holding that there is but one district in South Carolina is based on Section 546 of the Revised Statutes, and turned upon the words "of the district" in line 2 thereof. Said Mr. Chief Justice Fuller on page 6 of the opinion:

> "When, then, Congress enacted this section it seems to have construed the Act of 1823, not as dividing the State into two Judicial Districts, as indicated in the title of the act, but into two districts in sense of geographical divisions, which is in harmony with the language used in the body of the act. At all events, the phraseology of Section 546 is only consistent with the conclusion that the State constituted but one Judicial District, containing two divisions, which were 'called the eastern and western districts of the district of South Carolina.'"

But it will now be shown, absolutely and conclusively, by authority of an irrefragable character unattainable before the judgments, that Congress, in adopting the Revised Statutes, not only expressed the belief that two districts then existed in South Carolina and re-enacted such legislation accordingly, but then passed laws to that effect even if there

were not two districts before. And it will be demonstrated that the presence of the phrase "of the district" in line 2 of Section 546, without which it would have been simply impossible for the court to adjudge that South Carolina constituted "but one district, containing two divisions," is the result of a mere inadvertent omission to eliminate the same when amending the commissioner's draft of the revision of the laws in its passage through Congress. If this is satisfactorily shown—and it will be—it goes without saying that it will not only be the duty, but the pleasure, of this court to rectify such error committed because of the unavoidable failure of counsel to procure the authority by which to properly advise it before judgment respecting the interpretation of a local statute. Especially will this be done in a case which not only involves such grave consequences to the plaintiff in error, but practically deprives all the people in South Carolina of the constitutional right of being tried near their homes. To hold that there is but one district when in point of law there are two, practically deprives the citizen of the Constitutional right of being tried in the district wherein the crime is committed as if it should be held that he was not entitled to such right at all.

In view of the gravity of the issue involved, and in order that this error of the court may be revealed in its true light, a somewhat detailed history of the Revised Statutes will now be given: Early in the 39th Congress—December, 1865—Judge L. P. Poland, then a Senator from Vermont, introduced a bill into the Senate looking to a codification of the statutes. It became a law June 27, 1866 (14 Stat. 74), and, in accordance with its terms, three commissioners were appointed to revise the statutes. Finding that the three years allowed by the act in which to complete the work were insufficient, Congress, on May 4, 1870 (16 Stat. 96), revived the former act and gave three additional years in which to finish it.

The commissioners completed their work and laid it before the House Committee on the Revision of the Laws of the 42d Congress, early in the year 1873. It was bound in two volumes and styled "Commissioners Draft of the Revision," abbreviated "Com. D."

While not absolutely clear in their own minds as to whether there were two districts in South Carolina, yet inclining strongly to the opinion that there were not, the commissioners recommended that the State compose "one district, containing two divisions." Accordingly, all the sections on that subject were framed conformably to that idea. Their proposed legislation relative to it is as follows:

"Chap. 1, of Judicial Districts, Vol. 1, page 301."

"Sec. 1. The United States are divided into judicial districts as hereinafter provided.

"Sec. 2. The States of California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Rhode Island, *South Carolina*, Vermont, and West Virginia, each, constitute one judicial district." (Note under section 2):

"The States of North Carolina and South Carolina are here defined as constituting, each, one judicial district; notwithstanding the Act of April 20, 1802, designates the three divisions of North Carolina as 'districts,' and the Act of February 21, 1823 (3 Stat. 726), designates the divisions of South Carolina by the same name. The reasons for construing the so-called districts as only trial divisions are given under Sections 14 and 17."

Page 307, Sec. 17. "The *district* of South Carolina is divided into two *divisions*, which shall be called the eastern and western *divisions* of the *district* of South Carolina. The western *division* includes the counties of Lancaster et al., as they existed February

21, 1823. The eastern *division* includes the residue of said State." (Note under Section 17):

The Act of February 21, 1823 (3 Stat. 726), is as follows:

"That the *State* of South Carolina is hereby divided into two *districts* in manner following, that is to say: The districts of Lancaster et al. shall compose one *district* to be called the western *district*; and the residue of the State shall form one other *district* to be called the eastern *district*. And the terms of said district court, for the eastern *district*, shall be held in Charleston, at such times as they are now by law directed to be holden. And for the trial of all such civil and criminal causes as are by law cognizable in the district courts of the United States, which may hereafter arise or be prosecuted, or sued, within the said western *district* there shall be one annual session of the said district court holden at Laurens, to begin on the 2d Monday in May of each year, to be holden by the district judge of the United States of the State of South Carolina; and he is authorized and directed to hold such other special sessions as may be necessary for the dispatch of the causes in the said court, at such times as he may deem expedient, and may adjourn such special sessions to any other time previous to a stated session."

"By the Act of August 16, 1856 (11 Stat. 43), the district court was moved from Laurens to Greenville. And by Section 3 of the same act it is provided: 'That the said district court *for Greenville*, in addition to the ordinary jurisdiction of a district court of the United States, shall have jurisdiction of all causes (except appeals and writs of error) which now are, or may hereafter be, made cognizable in a circuit court of the United States, and shall proceed in the same manner as a circuit court.'"

"When the so-called 'districts' were established no provision was made for an additional judge, district attorney or marshal; and even the act by which they were established designated the term to be held in the western district as a term of the said District Court of South Carolina. The division, there-

fore, seems to have resembled the arrangement afterward adopted for Iowa.

"On the other hand, it is true, the grant of circuit court powers to the district court sitting in Greenville seems to give that division the character of a district, within and for which the district court is authorized to act as a circuit court. The arrangement is anomalous, and it has been deemed most convenient to preserve the designation of district of South Carolina, and to define the so-called districts as divisions."

"Chap. 4, District Court, page 307."

"Sec. 44. District courts shall be held as follows:

"In the eastern *division* of the *district* of South Carolina, at Charleston, on the first Monday in January &c.

"In the western *division* of said district, at Greenville on the first Monday in August."

"Chap. 15, of Juries, page 459."

"Sec. 281. The grand and petit jurors for the district court sitting in the western *division* of South Carolina shall be drawn from the inhabitants of said *division* who are liable, according to the laws of said State to do jury duty in the courts thereof, &c., &c."

No words in the English language could make it plainer that it was the intention of the commissioners to have "one district, with two divisions;" and had Congress seen fit to adopt their recommendation in that regard—which that body carefully and studiously refused to do—instead of constituting two districts—which it unquestionably did—it is passing strange that, in its passage through Congress, that body did not use that clear and unequivocal language instead of making such radical changes in the phraseology! Would Congress have stricken out the word "division" and inserted "district," and in divers sections at that, if it had

meant "division"? This is what was done, as will be shown presently.

Recognizing the chances for the commissioners to have committed numerous errors in the performance of such a herculean task, especially as they were empowered to change the law, out of abundant caution, a joint resolution was passed on the last day of the last session of the 42d Congress, March 3, 1873 (17 Stat. 579), authorizing the appointment of a joint committee, consisting of the Committee on Revision of the Laws of the House and Senate of that Congress, whose duty it should be to employ a lawyer, who, under their supervision and regulations, should revise the commissioners' draft and prepare it in the form of a bill to be introduced on the first day of the first session of the 43d Congress, December 1, 1873. This joint committee employed Thomas J. Durant, an eminent Washington City counsellor, and directed him, apart from the other duties enumerated, to restore the law in every instance where the commissioner's draft had changed it, whether that alteration was the result of mistake, or in consequence of the power with which they had been invested to amend it. Mr. Durant entered upon his duties in March, 1873, and completed it in October of the same year. On October 20 the joint committee held a meeting in conjunction with Mr. Durant, and the revision was finished, put in the form of a bill, printed and introduced into the House on December 10, 1873 (Cong. Rec. 43d Congress, Vol. 2, p. 129). Able lawyers composed that committee, among the number, B. F. Butler, chairman of the House committee; L. P. Poland, the author of the original bill in the Senate, who, in the meantime, had become a member of the House; and Roscoe Conkling chairman of the Senate committee. As stated, this second revision was the product of Thomas J. Durant, supervised and aided by the committees of the two Houses of Congress on the Revision of the Laws. It may, therefore,

be assumed that this work was ably and faithfully done, and it may be added, its leading feature was to make the revision an exact reflex of the then-existing statute laws of the United States—nothing added, nothing omitted.

All the sections of the Commissioner's Draft forming South Carolina "one district, containing two divisons," hereinbefore referred to and copied, were completely changed by this Durant revision so as to constitute the State *two districts*; and whoever entertains a vestige of a doubt respecting this important change having been wrought, after a critical examination of the methods by which it was accomplished, all of which will be minutely detailed below, is possessed of far more skepticism than was ever attributed to that arch-doubter, the Apostle Thomas.

No less fortunately for the plaintiff in error than for the members of this court, individually and collectively—for this august tribunal can as ill afford to render a judgment not in accordance with law as he can to have it done—the original manuscript revision of Mr. Durant correcting the errors of the commissioner's draft, wherein it is shown exactly what alterations were intended to be made and actually were made, is still in existence; and what is far more fortunate still, it reveals beyond a shade of a doubt that the commissioner's draft which *formed* South Carolina into "one district, containing two divisions," was thereby *transformed* into *two districts*, and separate and distinct in the sense in which the word "district" is used in the VI Amendment to the Constitution.

This manuscript revision is in (8) eight immense volumes and is now in the Law Library in the National Capitol. Mr. Durant and his co-adjutors (joint committees of the Senate and House on the Revision of Laws) went at it in a practical, common sense manner by simply cutting out leaf by leaf of the commissioner's draft, making such alterations thereon as were necessary to make it conform to their views,

and then pasting each leaf, as altered, in a large blank book, using only one side of a leaf to each page of the volume in which it was pasted. As stated, it is contained in eight (8) large volumes. The manuscript changes are in the handwriting of Mr. Durant himself.

The sections of the commissioner's draft, and the corresponding sections of the Durant manuscript revision, relative to the Districts in South Carolina, will now be placed in juxtaposition, with the erasures and interlineations marked in the latter precisely as they occur in the original.

The first section is an enumeration of the States of the Union which compose only one district. In the commissioner's draft, South Carolina is put in the list which forms one district, but in the Durant Revision it is erased—thus clearly showing that, in the former, South Carolina constituted one district, while in the latter it forms more than one.

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"The third section of the act authorized you to contract with some suitable person to prepare, under your supervision and under such regulations as you might prescribe, the revision of the statutes then already reported by the Commissioners, or which might by them be thereafter reported before the 4th day of May, 1873; and it was directed that such preparation should be embodied in the form of a bill, to be presented at the opening of Congress in December, 1873, all the laws so revised, with a proper index, so that the same might be in form to be acted upon forthwith by Congress at this session.

"The undersigned having had the honor to be selected by you to perform the work indicated in the act, has to the best of his knowledge and ability executed the task, and lays before you the result.

. . . . . .

"The titles and chapters reported by the Commissioners have been in most instances retained, but the numeration of the sections has been changed and made continuous throughout the preparation.

"*Every section reported by the Commissioners has been compared with the text of the corresponding act or portion of the act of Congress referred to, and wherever it has been found that a section contained any departure from the meaning of Congress as expressed in the Statutes at Large, such change has been made as was necessary to restore the original signification.*"

. . . . . .

"Respectfully submitted.

THOMAS J. DURANT.

Since it could serve no useful purpose for Mr. Durant in his report to specifically enumerate all of the multitudinous changes in the Commissioners' Draft which his nine months' incessant labor found to be necessary—largely augmented by reason of his being instructed to restore the law in every case, where the Commissioners, in the exercise of the power with which they had been clothed had altered it, as

well as where they had committed error—he did not mention exceeding a tithe of them. This is apparent, not only from a comparison of the report with the Manuscript Revision, but the report itself clearly says that *some* only of the changes were deemed material to be stated. It is obvious that Mr. Durant did not specify any changes, save where it might be questioned whether he or the Commissioners had mistaken the law; or, it may be, in cases where they were not of minor or local importance, or where the Manuscript Revision ~~should~~ unmistakably show on its face what changes had been wrought. Therefore, the report in question was, of course, silent as to South Carolina courts and districts—there being no need for it.

Says Judge L. P. Poland, the author of the bill to revise the statutes, and its chaperone through all its stages till its passage, in a speech in Congress on January 21, 1874 (Cong. Rec. of 43d Congress, Vol. 2, p. 819):

> "The Commissioners were authorized to make changes to a certain extent, for the purpose of harmonizing the statutes, of which liberty they availed themselves to some extent. . . .
>
> "When the Committee on Revision came to examine the work they became satisfied that it was utterly impossible to carry the work through Congress if it was understood that any changes had been made. Hence, under a special act passed at the last day of the last Congress the Committee on Revision of the Laws, under authority of that act, employed Mr. Durant, a lawyer of this city, to take this work and go over it and expunge from it everything in the nature of a change; anything that altered the law in any particular from what it stood upon the statute book. Mr. Durant went over the work for that purpose and also arranged it in form to be presented as a bill before the House.
>
> . . . . . .
>
> "It shows what he did in carrying out the instructions of the committee in divesting the work of any change.

> "As I said, the committee concluded that it would be impossible to carry the bill through if any change was put in it. By the aid of Mr. Durant, and our own efforts in examining it, we have made it as perfect reflex of the Statutes as it was possible to do."

Durant's manuscript revision was printed and bound, put in the shape of a bill by its author, and introduced into the House, on December 10, 1873, by B. F. Butler, Chairman of the Committee on Revision of the Laws (Cong. Rec., 43d Congress, Vol. 2, p. 129), and was passed as the Revised Statutes. The original Durant Revision, a bound printed copy, and his report accompanying the same, have only recently been discovered—since the judgments on February 21, 1898—and have been removed into the Law Library. A comparison of the sections with the corresponding sections of the Revised Statutes, so far as concerns the districts in South Carolina, will show that they are exactly identical. So, it necessarily follows that if Mr. Durant, in his revision, changed the Commissioner's Draft from "one district, with two divisions," to *two districts*, Congress adopted it in the Revised Statutes.

Following is a table showing the sections of the Durant Revision which correspond with those in the Revised Statutes, relative to the districts in South Carolina:

Sec.	534,	Durant's	Rev.,	corresponds	with	Sec.	531, R. S.
"	549,	"	"	"	"	"	546, "
"	575,	"	"	"	"	"	572, "
"	770,	"	"	"	"	"	767, "
"	779,	"	"	"	"	"	776, "
"	820,	"	"	"	"	"	817, "

The Durant Revision received careful consideration in its passage through Congress. It was introduced on December 10, 1873, and referred to the Committee on Revision of the Laws. That committee parcelled it out among its members; made each committeeman a committee of one on certain

parts of it; then considered each committeeman's work, and then reported the bill to the House. In its passage through that body divers amendments were made—but only to make it conform to the then existing law—but no change was made, or even suggested, in regard to the districts in South Carolina. This the Congressional Record, as well as the fact that the Durant Revision and the Revised Statutes are the same, clearly show. The bill was No. 1215, and here are the exact pages of the Congressional Record of the 43d Congress, wherein it was considered: Pages 129, 646–650, 819–829, 849–858, 995–1001, 1027–1031, 1206–12, 1249–54, 1414–17, 1460–62, 1611–20, 1657–62, 1789–95, 1819–25, 1968–76, 2005–55, 2709–14. The bill passed the Senate without amendment and was approved June 22, 1874.

The Commissioner's draft formed South Carolina "one district containing two divisions." This is sure. The Durant revision, as appears both by the manuscript and the printed copy (and they are identical, of course,), changed it to *two districts.* This is equally sure. Now, whose views of the law did Congress adopt when the matter came before that body? The Record must settle the question. Compare the sections in the above table and it will appear that the Revised Statutes are a literal transcript of the Durant Revision—every word, syllable, letter and punctuation mark! The conclusion, therefore, follows "as sure as the night the day,"—and there is no avenue of escape from it—that there are *two districts* in South Carolina!

Sections 551, 552, Revised Statutes, shed light on this subject. The first says that there shall be a district judge in each district, save in the cases in Section 552. The latter declares that one district judge shall be appointed for South Carolina. who shall be judge for "each district" in that State. This is a clear recognition of *two districts* in the State, for, if they were "divisions" the matter would not have been mentioned at all; or, if it had been, they would have been called "divisions." These sections, as well as Sections 767, 776, relative

to district attorneys and marshals in South Carolina, are merely a re-enactment of what was clearly implied in the Act of February 21, 1823 (3 Stat. 726), dividing South Carolina into two districts, making one judge, one district attorney and one marshal, act for both districts.

Section 571, Revised Statutes, clearly recognizes two districts by vesting the district court in the *western district* with circuit court jurisdiction. This is the bringing forward of a part of the Act of August 16, 1856 (11 Stat. 43), which first gave the district court in that district circuit court powers.

Before the adoption of the Revised Statutes it seems to have been regarded that there were two districts in South Carolina, but that the circuit court jurisdiction extended over both. Mr. Conkling's Treatise so regarded it, owing to the failure of the Act of February 21, 1823, which divided the State into two districts, to provide circuit court terms. Such was the theory of Circuit Judge Bond in the South Carolina Ku Klux trials, in 1871, which was before the adoption of the Revised Statutes. But even if the circuit court did have jurisdiction over both districts, the trial and all its incidents—indictment, jurors, &c., &c.,—must needs have occurred in the district where the offense was committed. This, by Art. VI of the Constitutional Amendments, But this question loses its practical importance for, by Section 608, Revised Statutes, there was created a circuit court in each of the districts in South Carolina.

The circuit court decisions (United States *vs.* Butler, 1 Hughes, 457; and Young *vs.* Ins. Co., 29 Fed. Rep. 273) rendered since the adoption of the Revised Statutes, simply followed the decision in the Ku Klux trials, which was rendered before, and seemed to overlook the provisions of the Revised Statutes on that subject. But whether those decisions were correct or incorrect, either by the law before or after the adoption of the Revised Statutes, an act has been passed by Congress since their rendition (February 6, 1889), which clearly established a circuit court, *eo nomine*,

in the western district, even if it had not been done before, which necessitated the indictments and trials in these cases to have occurred there. But this matter will be noticed later on.

The word "division" is no where used in the Revised Statutes with reference to South Carolina. "District" is used every time. This is significant, especially in view of the fact that, in regard to the district of Iowa, which was divided into two divisions, the word "division" is used (Sec. 537, Rev. Stat.). The reason is obvious—that Congress intended to constitute "districts" in South Carolina, and "divisions" in Iowa.

So much for the law as to the districts in South Carolina by the Revised Statutes. It now remains to be seen whether Congress has changed it since by merging the two districts into one.

IV.

The legislation since the adoption of the Revised Statutes recognizes the two districts in South Carolina.

The first statute on the subject is the Act of January 31, 1877, (19 Stat. 230), amending Sec. 571, Rev. Stats., which vested the district court for the western district with circuit court powers. The act in question recognizes the Western district of South Carolina and a district court therein with circuit court jurisdiction. The word "district," not "division," is used.

The next act on the subject is that of February 6, 1889 (25 Stat. 655), which not only recognizes the western district by abolishing circuit court jurisdiction, but establishes a circuit court, *eo nomine*, therein. This statute is a well-considered one. The territorial limits of the court are defined —coextensive and coterminous with the western district, of course. Provision is made for the transfer of the records and pending causes of the then abolished district court with

circuit court powers, to the then established circuit court. A clerk for the newly-created circuit court is required to be appointed. Time and place are arranged for holding its terms—the same as then fixed for the district court. The district attorney and marshal of the districts are directed to act as such for the circuit court. This is a very cautious act—it takes nothing for granted. Some of its provisions would have been implied; and while the circuit court already existed in that district by virtue of Sec. 608, Rev. Stat., but no sessions had been arranged, because there was no necessity for it, since a district court with circuit court powers is, in law, though not in name, a circuit court—out of abundant caution the circuit court was created as well as terms provided for. All this goes to show that it was clearly the intention of Congress to have two districts in South Carolina—the eastern and western—with a district and circuit court in each. The act is as follows:

> "An act to abolish circuit court powers of certain district courts . . . and for other purposes."
>
> "Section 1. That there is hereby established a circuit court in and for the Western District of Arkansas, for the Northern District of Mississippi, *and for the Western District of South Carolina*, as the said district courts are now constituted by law. And the terms of said circuit courts, respectively, shall be held at the times and places now provided by law for the holding of the district courts in said district, respectively.
>
> "Sec. 2. That said circuit courts shall have and exercise, within their respective districts, the same original and appellate jurisdiction as is or may be conferred by law upon the other circuit courts of the United States; and all suits now pending in the said district courts in which the said district courts exercise circuit court powers shall be transferred to said circuit courts, and shall be proceeded with accordingly.
>
> "Sec. 3. That there shall be appointed for each of

said circuit courts by the circuit judge of the circuit in which said districts are embraced a clerk, who shall take the oath and give the bond required by law for clerks of circuit courts, &c., &c. And the marshals and district attorneys for said districts shall discharge the duties in said circuit courts.

"Sec. 4. That said circuit courts shall have power to make such orders and directions as shall be proper for the transfer from said district courts of all causes, records, &c., &c., as by force of this act should belong to said circuit courts."

Sec. 5 repeals Sec. 571, Revised Statutes, as amended by the Act of January 31, 1877, which confers on said district courts circuit court powers. It also repeals all inconsistent statutes.

Approved February 6, 1889.

So that, whatever doubts may have existed prior to this act relative to the districts and courts in South Carolina, there can be no question but what this statute clearly established—even if it had not been done before, which it had—the western district of South Carolina, with well defined limits, with both a district and a circuit court therein. Spartanburg County is in that district (Sec. 546, Rev. Stat.) and before a person charged with crime in that county (as the indictments charge in these cases), can be indicted or tried elsewhere than in that district, it must clearly appear by express legislation, and not by mere infer ences, that the western district has been abolished. And right here it is proper to remark that this act effectually disposes of the three circuit court decisions alluded to in the opinion of Chief Justice Fuller (Ku Klux cases, decided in 1871; U. S. *vs.* Butler, 1 Hughes, 457, decided in 1877; and Young *vs.* Ins. Co., 29 Fed. Rep 273, decided in 1886), for they were all rendered before the enactment of the statute.

The next act on the subject is that of April 26, 1890 (26 Stat. 71), which, as indicated by both its title and its body, has for its object the fixing of the terms of the courts, and

with no view of interfering with the districts in that State.

Since this statute was discussed orally at the bar and by the briefs of counsel during the argument of these cases on January 21, 1898 (see brief of plaintiff in error, pp. 17–19), it will receive only a passing notice. It has never been and cannot be, seriously contended that its provisions are, *per se*, sufficient to repeal the provisions of law creating two districts in South Carolina with a district and circuit court in each—assuming those conditions to exist. Of course not. In the first place, it is difficult to conceive of any reason why Congress should inaugurate a retrograde movement and repeal a law so beneficial to the citizen in giving him a trial near his home in both civil and criminal cases, by abolishing the two districts and merging them into one. Reforms go not backward. And it is passing strange that the evidence of such a radical change of the law should stand on no surer foundation than presumption, implication or inference. There is no express repeal. If a repeal at all, it is only by implication—a method of repeal abhorrent to the courts. If such an important change had been intended, especially so soon after the Act of February 6, 1889, clearly and fully reaffirming the existence of two districts in the State, would not express words of repeal have been used?

True, the act in question does, in its title, *assume* that there is only one district in the State. But the title is no part of a statute. And Sections 1 and 2 of the act also *assume* the existence of but one district. But laws are made or unmade, especially the latter, not by *assumption*, but by *enactment*. And this *assumption* in Sections 1 and 2 that there is but *one district* is completely negatived by the *assumption* in Sections 3 and 4 that there are *two districts*—the eastern and western. The only thing that can be claimed for the act is that, assuming that, by previous statutes, there was but one district, there is not enough in it to change the law and constitute it two districts. Such seems to have

been the views of Chief Justice Fuller in commenting upon it. This contention is correct. And, in like manner, assuming that, at that time, there were two districts, there is not sufficient in the statute to abolish the two districts and merge them into one.

But the act in question was expressly construed in an official opinion by Attorney General Harmon in a letter addressed to Congressman, now Senator, McLaurin, of South Carolina, on February 29, 1896, wherein he expressly holds that it did not change the law which divided the State into two districts. This letter is published in full in the Congressional Record of March 4, 1896 (p. 2450), and also in the br ef of plaintiff in error on page 19, as well as *infra*, p. 34.

The act shows on its face that it was clumsily drawn by a person of confused ideas in relation to the districts in South Carolina, and manifests no intention to change the law with regard thereto—only to regulate the sittings of the courts.

Another principle of construction is conclusive of this matter, which is that the positive provisions of a statute can not be restrained by inference. Said Mr. Justice Brewer in Rosencrans *vs.* U. S., 165 U. S. 263:

> "When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, when Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express and will not be overthrown by any mere inferences or implications to be found in such subsequent legislation."

While not of absolutely controlling importance, yet a circumstance entitled to great weight, is the fact that, on the self-same day of the passage of this act—April 26,

1890—two statutes were enacted dividing two other districts of the United States into divisions. The district of North Dakota was divided into four divisions (26 Stat. 67), and the district of Minnesota into six (26 Stat. 72). It follows, therefore, that the attention of Congress was at that very time directed to that very subject—districts and divisions—and, hence, the use of the word "district" could not have been accidentally or carelessly used in the act in question when "division" was intended. Under these circumstances, had Congress designed the merger of the two districts into "one district, containing two divisions," how natural and how easy it would have been to have so declared! And as that body did not say so, the conclusion is irresistible that such intention was foreign to its purpose!

Besides, the theory that this act abolishes the two districts and merges them into one is repugnant to the course of subsequent legislation, which, by a familiar canon, is at war with such construction, as will subsequently clearly appear. Legislative interpretation of a doubtful statute is good.

Sutherland on Stat., Sec. 311.

Black on Stat., 223; 19 Wall. 339.

The next statute on this subject is the one enacted July 23, 1892 (26 Stat. 261), which, both in its title and body, in express terms, recognizes the "eastern *district* of South Carolina," in providing for a May term of the district court for that *district*. If there is an *eastern district*, it necessarily follows that there is a *western district* also. This is practically an amendment of the Act of April 26, 1890 (26 Stat. 71), and hence, a legislative exposition of the latter, which altered the time of holding the spring term of the district court for that district from May to April. This act of 1892 changes the time back to May. There is nothing in this act which, directly or indirectly, indicates that the word "district" was meant to be used for "division." A statute is its own best expositor and words are construed according

to their known signification unless the context shows that they were used in a different sense.

The next statute on the subject is that of May 28, 1896 (29 Stat., pp. 180, 182), where the method of compensating district attorneys and marshals by fees was changed to salaries, which was engrafted upon the legislative appro, priation act, and is as follows:

> "The district attorney for the eastern and western district of the district of South Carolina, $4,500; $2,500 of which shall be for the performance of the duties of the western district" (p. 180);

and, *mutatis mutandis*, the same language is used relative to the emoluments of the marshal (p. 182). Standing alone, and read superficially, without the aid of the other language in the sections where they occur, and by one unfamiliar with its legislative history, especially before the calcium light had been turned on and disclosed that the phrase "of the district," in Sec. 546, was a mere clerical error, to be rejected as surplusage, this act might, with some plausibility, be argued as a kind of legislative recognition that the subdivisions are mere *divisions*, and not *districts*. Chief Justice Fuller simply mentioned the act without commenting thereon. It will now be critically examined and conclusively shown that it not only does not tend to support the theory that they are *divisions*, but that they are *districts*

The committee reported the bill to the House on March 4, 1896 (see Cong. Rec., 54th Congress, p. 2445). Section 1 abolishes the fee system and puts district attorneys and marshals on salaries. Section 2 takes up the States in alphabetical order, beginning at Alabama, provides what salaries the district attorneys shall receive, and goes down the list till South Carolina is reached. It assumes that it composes but one district. Here is the exact language:

> "The district attorneys for each of the following districts shall be paid annual salaries as follows:
>
> . . . . . .
>
> "For the district of South Carolina, $4,500."

The committee were misled in the matter by the Department of Justice, which, in making its report concerning the then incomes of the various district attorneys so as to give the committee the data whereby to regulate the salaries of these officials, treated South Carolina as one district. This error crept into the department on account of there being but one judge (Sec. 552, Rev. Stat.), one district attorney (Sec. 767, Rev. Stat), and one marshal (Sec. 776, Rev. Stat.). for the two districts in South Carolina, and in consequence, they came to regard it as only one district instead of two.

And right here it will be stated that, had it been the design of Congress to recognize "but one district, containing two divisions," the language used by the committee could not have been improved upon, and, hence, no amendment would have been offered even, much less adopted—as was done—affirming the existence of two districts, for, not only is there no necessity for Congress, when regulating the salary of a district attorney in a district, containing more divisions than one, to allude to the several divisions, but it is not the custom so to do (see section 2 of this act, p. 180). where the word "division" is not used once in arranging the salaries for the several districts which do contain more than one division).

During the consideration of the section in question, when South Carolina was reached (Cong. Rec., 54th Congress, March 4, 1896, page 2450) Representative, now Senator, McLaurin, formerly attorney general of that State, moved to amend that part of it so as to read:

> "for the eastern district of South Carolina, $2,000;
> for the western district of South Carolina, $2,500."

This amendment was offered for the evident purpose of preventing Congress from being committed to the theory of one district, and in order to have the recognition of two districts, since, as the proceedings show, a bill was then pending in both Houses for the appointment of a district

attorney and marshal for the western district. It is, therefore, fair to assume that the subject was well considered, and hence, when the conclusion that there were two districts was finally reached, it was the result of mature deliberation. Here follow the proceedings, in part, on Mr. McLaurin's amendment:

> "Mr. MCLAURIN. I offer the amendment which I send to the clerk's desk.
>
> (The amendment was read and was as before stated.)
>
> "Mr. MCLAURIN. As the committee speaks of the 'District of South Carolina,' I wish to correct a mistake. There is no such thing as the 'district of South Carolina,' but the State is divided into an eastern and western district. In the report of the Attorney General a mistake was made in speaking of South Carolina as the 'district of South Carolina.' I have called his attention to it and have his letter which the clerk will please read. I believe the gentleman in charge of the bill has consented to accept my amendment. The letter was read by the clerk as follows:
>
> "DEPARTMENT OF JUSTICE,
>
> "WASHINGTON, D. C., February 29, 1896.
>
> "SIR: With reference to the question whether there are two judicial districts in South Carolina or only one, I beg to say that I have caused an examination to be made, with the following result:
>
> "'When the first register of this Department was prepared, in 1888, Mr. Jenks, then Solicitor-General, examined the question, which was brought to his attention by the appointment clerk, and advised that South Carolina be entered therein as a single district, which was done and has been repeated in subsequent issues.
>
> "'I learn further that the question arose at the commencement of President Harrison's term and was considered by Attorney General Miller, but I am unable to find any record of the conclusion he reached, if he reached any. The practice, however,

has grown up of considering the State as a single district in all matters connected with the judicial affairs of that State, including appointments to office. Various acts of Congress refer to the State as a single district, although they also mention it as two districts. For instance, the Act of April 26, 1890 (26 Stat. 71), is entitled "an act to regulate the sitting of the courts of the United States within the district of South Carolina," yet Sections 3 and 4 speak of eastern and western districts. But it is useless to multiply instances. I am unable to find anything in the statutes which affects the provisions of Sections 546 and 767, Revised Statutes, which divide the State into two districts. I think, therefore, that you should call the attention of the Judiciary Committee to this matter and have the bill amended to fit the case.

"'Very respectfully,

"'JUDSON HARMON,

"'*Attorney General.*

"'Hon. JOHN L. MCLAURIN,

"'*House of Representatives.*'"

The matter was discussed at length by Representatives Culberson, Bailey, Henderson, Talbert, Elliott and others, and not only was it not insisted by anyone that the State composed only one district, but it was admitted by them all that there were two districts. Attention of the court is earnestly invited to the proceedings and speeches made upon the subject. This amendment was rejected, not because any one questioned there being two districts, but on account of it being developed that there was a bill pending before each House for the appointment of a district attorney and marshal for the western district, and it was supposed that the adoption of the amendment might have the effect of providing for their appointment. But it was substantially adopted on motion of Representative Bailey the next day (pp. 2494, 2496), in regard to marshals where the word "eastern" was inserted—since the marshal for the eastern district acted as such for the western district and it was

thought that would accomplish the object. So the other section, relative to district attorneys was recurred to and the word "eastern" inserted. In that shape, "for the eastern district of South Carolina, $4,500," the bill was passed as regards both the district attorney and marshal and went to the Senate.

On March 26, 1896 (Cong. Rec., p. 3180), the committee of the Senate reported the bill with amendments increasing the salaries to $5,000, and so as to read, "for the eastern and western districts of South Carolina, $5,000." But, on Senator Tillman's motion, it was so amended as to read as follows:

> "For the eastern district of South Carolina, $5,000, $3,000 of which shall be for the performance of the duties of the western district," and "passed the Senate" (Cong. Rec., p. 3180), in that shape.

On March 27, 1896 (Cong. Rec., p. 3279), it went to the House, where the amendment in that regard was non-concurred in, and then went to a conference committee (March 31, 1896, p. 3299).

The conference report was made April 25 (Cong. Rec., 4422), and an attempt was made by it to have "divisions" of the "district" recognized, but, as will be shown later, it failed. Here is the exact language of the conference report in that regard (Sec. 7):

> "The district attorney for each of the following districts of the United States shall be paid an annual salary, as follows (taking the States in order and going on till South Carolina is reached): For the eastern and western *divisions* of the district of South Carolina, $4,500."

And the conference report was identical in this regard respecting marshals (May 5, pp. 4765–66).

In this shape, the conference report was adopted, but subsequently changed, striking out "divisions" and insert-

ing "districts." (See Cong. Rec., p. 4845 (May 5), where Mr. Bingham made the motion for the purpose and gave the reasons therefor, namely, that there were two "*districts*" in South Carolina and not "*divisions.*") It was adopted and passed precisely as it is in the Revised Statutes, namely:

> "For the eastern and western districts of the district of South Carolina, $4,500, $2,500 of which shall be for the performance of the duties of the western district."

It, therefore, plainly appears that Congress in terms repudiated the theory that the districts in South Carolina are "divisions," but, on the contrary, expressly declared that they are "districts." And the phrase "of the district" which appears in the act in question is the result of a mere inadvertence (clerical error), as it is in Sec. 546, Rev. Stat. Or it may be that, construing these words in Sec. 546 as creating two "districts," and not "divisions," it was a legislative interpretation of them accordingly. At all events, it is manifest that Congress, by that act, recognized two "districts," and not "divisions."

Again, the bare reading of the language of the act clearly shows that two districts were recognized. Why use the words "for the eastern and western districts" if Congress thought they were "divisions"? Why change the report of the committee "for the district of South Carolina"? Such course was not pursued in the divers other districts in the United States that are divided into divisions. The act clearly shows this. And why add the words "$2,500 of which shall be for the performance of the duties of the western district"? It was not deemed proper to use such words in relation to the three divisions into which the southern district of Georgia is divided, nor, in fact, with reference to the many other divisions in the several districts, as a reference to the act will clearly show.

This embraces the entire legislation on the subject from

the adoption of the Revised Statutes down to the present, and it appears in no statute, not only during that period, but from the time the State was first divided into two districts, February 21, 1823, that the word "division" was ever used in reference to the districts in South Carolina. This is very significant, especially since so many of the districts in the various States are divided into divisions, as will appear by the following table:

Northern district of Alabama has two divisions.
Eastern district of Arkansas has two divisions.
Northern district of Georgia has two divisions.
Southern district of Georgia has three divisions.
Northern district of Illinois has two divisions.
Northern district of Iowa has four divisions.
Southern district of Iowa has three divisions.
District of Kentucky has two divisions.
Eastern district of Louisana has two divisions.
Western district of Louisana has three divisions.
Western district of Michigan has two divisions.
Western district of Minnesota has six divisions.
Northern district of Mississippi has two divisions.
Southern district of Mississippi has three divisions.
Eastern district of Missouri has two divisions.
Western district of Missouri has four divisions.
District of North Dakota has four division.
District of Ohio has two divisions.
District of South Dakota has three divisions.
Eastern district of Tennessee has two divisions.
District of Washington has four divisions.

In all the legislation pertaining to the subdivisions in all these States in all these districts, the word "division" is used invariably. The question which naturally arises is, why was the word "division" used in regard to all them, and the word "district" in reference to South Carolina?

It appeared from the proceedings relative to the act (May 28, 1896), that a bill for the appointment of a district attorney and marshal for the western district of South Carolina was then pending in both Houses. The Senate bill passed that body on January 7, 1897 (Cong. Rec., p. 533), unanimously. In the course of the proceedings Senator Hoar, chairman of the Judiciary Committee, in part, said:

> "This bill was considered by the Judiciary Committee and reported at the last session. It had the support of the Senators from South Carolina and also support from the bar of that State. Of course, the Senate is familiar with the condition of South Carolina. There have been two judicial districts there for a good while, but the marshal and district attorney for one of the districts have performed the duties of the other. This bill provides for a separate marshal and separate district attorney.
>
> "If this bill should pass, then, of course, it will be necessary to have a change in the proper appropriation bill."

. . . . . .

Again, on the same page, he said:

> "This bill was reported from the Judiciary Committee on full consultation, as I stated. That committee also reported as to salaries in a general salary bill for all the district attorneys in the country. That was referred to the Appropriations Committee and put on an appropriation bill, and was settled after going into conference. I was on that conference committee, but the final action on the conference report took place after I left for Europe. But I am sure it was arranged."

Mr. Tillman said:

> "If the Senator will allow me, it recognizes a difference in the two districts, and fixes the salary for each district separately."

. . . . . .

> Mr. HOAR. "I can give it to the Senator. It is just as I stated it. The provision is:
>
> "'For the eastern and western districts of the district of South Carolina, $4,500, $2,500 of which shall be for the performance of the duties of the western district.'"
>
> . . . . .
>
> Mr. TILLMAN. "The salaries are separated."

The bill was reported to the Senate without amendment and passed.

The bill was sent to the House and referred to the Judiciary Committee, from which it was never reported. But we are bound to presume that, as no dissenting voice was raised as to there being two districts when the act (May 28, 1896) was debated, it did not fail of passage on that account.

All know how difficult it is to get legislation through the House. If it were not going out of the record to do so, it might be stated that the then district attorney and marshal for the eastern district contributed to its defeat on account of the pecuniary loss which would have resulted to them by having their salaries reduced from $4,500 to $2,000 a year.

BRIEF REVIEW OF THE JUDGMENTS.

The Chief Justice, on page 2 of the opinion, asks the question:

> "Were there at that time—December, 1894—two judicial districts in South Carolina within the intent and meaning of the Constitution and the acts of Congress in that behalf?"

By which it is clear that that was deemed a pivotal point in the case—one which, if answered affirmatively, must needs result in a reversal of the judgments. The matter is then discussed, the reasons given and the authorities cited,

by which a negative conclusion is reached, and hence, an affirmance the consequence.

The learned Chief Justice, after commenting upon divers acts, takes up Section 546, Revised Statutes, on page 6, and in respect thereto, uses the following language:

> "When, then, Congress enacted this Section, it seems to have construed the Act of 1823, not as dividing the State into two judicial districts, as indicated in the title of the act, but into two districts in the sense of geographical divisions, which is in harmony with the language used in the body of the act. At all events, the phraseology of Section 546 is only consistent with the conclusion that the State constituted but one judicial district, containing two divisions, which were called the eastern and western districts of the district of South Carolina."

So that it not only appears that the question of two districts was esteemed of vital consequence in the case, but that it inevitably hinged upon the proper interpretation of that section—546; and not only that, but it is obvious that it depended upon the construction of the phrase "of the district" for, with these words expunged, there could not possibly be a shadow of a doubt but what the section in question constituted two districts. With the advisement that counsel were able to give the court at the argument as to the true exposition of that phrase in that section, it is not surprising that the conclusion should have been reached that there was "but one district, containing two divisions," but since the discovery of Durant's Manuscript Revision—all of which have been detailed before, by which it clearly appears that the phrase "of the district" was left in the section by a mere clerical error, it would now seem that there cannot be two opinions on the subject—that there are, by that section, two districts in South Carolina.

In support of his position, the learned Chief Justice calls attention to the fact that all this time, and even now there

is "but one judge, one attorney and one marshal for the district of Carolina." But it will be remembered that by the express terms of Sections 552, 767 and 776, there shall be one judge for "both districts in South Carolina," and that the district attorney and marshal for the eastern district shall act as such for the western district. So, instead of this being an argument in favor of *one district*, it supports the theory that there are two.

Allusion is made to the Ku Klux trials, in 1871, before the adoption of the Revised Statutes, in 1874, where it was held that the circuit court had jurisdiction over both districts. But this decision, apart from its unsoundness, being prior to the Revised Statutes, which, even if it had not been done before, established two districts in the State with a circuit and district court in each, and hence is of no value as authority, and the circuit decisions U. S. *vs.* Butter, 1 Hughes, 457, and Young *vs.* Ins. Co., 29 Fed. Rep. 273, simply followed the precedent of the Ku Klux trials and were decided, no doubt, without an examination of the Revised Statutes. But however this may be, the Act of February 6, 1889, enacted, of course, since the rendition of the three decisions above mentioned, created a full-fledged circuit court in the western district and, hence, repealed all prior laws inconsistent therewith, whether found in statutes or decisions, and remains intact to-day. This act, while briefly touched upon by the learned Chief Justice, was evidently overlooked in its full scope and effect, since it is difficult to conceive how it would be possible when its provisions are examined, for any conclusion to be reached that there is "but one district."

The Acts of April 26, 1890 (26 Stat. 71), and May 28, 1896 (29 Stat 180, 182), have been hereinbefore fully examined and need no further notice here. They do not disturb the previous law on the subject, but, on the contrary, are in harmony with it.

It will be remembered that Mr. Chief Justice Fuller is a member of all the circuit courts of the fourth circuit, which embraces South Carolina. So was his immediate predecessor. Ever since his accession to the bench—a decade ago—he has been participating in the hearing of causes in that State in conjunction with the district and circuit judges, where it was assumed that (following the decisions in the Ku Klux trials, United States *vs.* Butler, and Young *vs.* Insurance Co., *supra*), the circuit court had jurisdiction throughout both districts. Naturally, therefore, when the present causes were argued, and when it so occurred that to him was assigned the duty of deciding them in the first instance, subject, of course, to confirmation by the other members of the bench, he had preconceived ideas on the subject. Having, of course, confidence in the wisdom and judgment, as well of his predecessor as of his colleagues of the circuit bench, it is simply impossible to tell just how far his previous opinions may have influenced his mind. No one can know. He himself cannot. Besides, pride of opinion may have played a conspicuous part. In addition, judicial cognizance is taken of the fact that during the interval which elapsed between the arguments in the courts—January 21, 1898—and the rendition of the judgment—February 21, 1898—the learned chief justice sat in the Circuit Court of Appeals in Richmond, with other members of the circuit court for that circuit, who, of course, had already decided the question adversely to the position contended for by plaintiff in error.

Besides, the great influence, natural and legitimate, of course, which the learned Chief Justice wields over his associates of the Supreme Bench—owing to his eminent qualities of head and heart—may have caused them, in view of the fact that the question depended solely upon a long series of local legislative acts with which it would be inferred that he would be far more familiar than themselves, and involved

no elementary principle of law, to have deferred to him in this instance far more than is their wont in other cases.

These matters are mentioned, not as being, of themselves, of controlling weight, of course, but for the purpose of inducing each individual member of the court to carefully and diligently revise the judgments and the grounds upon which they are rendered, to the end that it may be seen whether or not mistake has been committed.

Second Point.

The exceptions contain evidence that there was misjoinder of defendants and offenses.

The trial courts certified in the bill of exceptions that the evidence showed that several distinct offenses committed by different defendants had been joined. This court, therefore, overlooked this fact in deciding that the bill of exceptions does not contain the evidence, and, therefore, error was committed in declining to consider the question whether an election should have been compelled by the court below. An examination of the records—Exception No. 4 in Case No. 53, and Exception No. 3 in case No. 175—clearly show that the trial court so certified.

True, the bill of exceptions does not set out the testimony of the witnesses as delivered on the stand; but, by repeated rulings of this court, not only is this not necessary, but it is bad practice to encumber the record with more of the evidence than is necessary to the point involved; and certifying the substance of the evidence—what it tended to prove—will suffice. Some courts express it that the *facts*, and not the evidence of them, only should be incorporated.

R. R. *vs.* Ives, 144 U. S. 414.
Pritchard *vs.* Budd, 76 Fed. Rep.

It is, therefore, submitted that the question should have been considered, and if so, the authorities cited in the brief of plaintiff in error at the argument necessitate a reversal of the judgment.

Third Point.

Record fails to show that a grand jury of not less than twelve nor more than twenty-three men found the indictments.

The court overlooked the fact that the records fail to show that a grand jury of not less than twelve nor more than twenty-three men found the indictments. This defect renders the proceedings null. Objection can be taken at any time, on error or in arrest. Authority on this point is needless.

Although this was not excepted to at the trial, yet under numerous decisions of this court, error apparent on the record can be considered, even though not excepted to nor incorporated into a bill of exceptions. Simply raising the point at the argument is sufficient.

Crain *vs.* U. S., 162 U. S. 646.

These objections can't be waived.

Hopt *vs.* Utah, 110 U. S. 574.

CONCLUSION.

Absolute certainty of the incorrectness of the judgments is not an essential condition of the granting of a rehearing. The sole requisite is that doubts of its correctness are entertained which it is supposed will be removed by further discussion at the bar. Such seems to be the rule of this court as illustrated by the practice and as exemplified by numerous adjudications. Tested by it, and without giving anything like a recapitulation, a few observations will now be made upon one ground of the motion, from which it would seem that a rehearing must be the inevitable consequence :

As to there being two districts.

1. In the multitude of acts on the subject—and their name is legion—from February 21, 1823, down to the

present time, the word "district" is used every time and the word "division" not once. The act in question uses "judicial district," and says "The State" is divided, &c., not "The district" is divided, &c.

2. The Act of August 16, 1856, vested "the district court of the western district of South Carolina with circuit court jurisdiction." Was a separate and distinct district and circuit court ever created before or since in the United States in a *division* of a district? *Cui bono?*

3. Aside from Durant's manuscript revision having been discovered, which demonstrates that Congress, by the Revised Statutes, even if it had not been done before, intended to, and did, establish two districts in the State—clearly showing that the phrase "of the district" in Section 546 was a clerical error—there could be no question in regard to it when construed in connection with Sections 530, 531, 551, 552, 571, 572, 767, 776, and 817, Revised Statutes.

4. Aside from every solitary statute passed on the subject since the Revised Statutes recognizing two districts, the Act of February 6, 1889, plainly abolished circuit court powers of the district court for the western district and created a full-fledged circuit court, *eo nomine*, therein.

5. In addition to the opinion of Congress, Attorney General Harmon, and Senator McLaurin (formerly Attorney General of South Carolina) in the discussion of the Act of May 28, 1896, in its passage through that body that there are two districts, there is the deliberate and unanimous judgment of the United States Senate on January 7, 1897, when that body passed the bill authorizing the appointment of a district attorney and marshal for the western district.

CHARLES C. LANCASTER,
A. H. GARLAND,
JOHN L. McLAURIN.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Nos. 53 and 175 (Consolidated).

CHAS. P. BARRETT, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES.

In Error to the Circuit and District Courts of the United States for the Districts of South Carolina.

Second Petition and Brief for Re-hearing.

Statement.

The legal proposition upon which plaintiff in error mainly relied for a reversal of the judgment was, that South Carolina composed two judicial districts—the Eastern and Western. But this court, on February 21, 1898, speaking by Mr. Chief Justice Fuller, held that that State constituted "but one district, containing two divisions," and, therefore, judgments of affirmance were rendered. Subsequently, a petition for rehearing, supported by an elaborate and exhaustive brief, was filed. which, only a few days ago, was denied. Counsel for plaintiff in error, in view of the grave consequences resulting to their client, and especially since this court has unquestionably committed mistake of law, makes the second application for a rehearing:

Application for Re-hearing.

To the Supreme Court of the United States:

Chas. P. Barrett, plaintiff in error, makes the second application for a rehearing, not only upon the grounds stated in his former petition for that purpose, but for the following additional reasons, to-wit:

Because the court failed to give full force and effect to the following acts of Congress:

1. The Act of February 21, 1823, [3 Stat., 726,] re enacted as Sections 546, 551, 552, 767 and 776, Revised Statutes.

2. The Act of August 16, 1856, [2 Stat., 43,] re-enacted as Sections 571 and 817, Revised Statutes.

3. The Act of February 6, 1889, [25 Stat., 655].

4. The Act of July 23, 1892, [27 Stat., 291].

5. The court failed to give full force and effect to the manuscript revision of Thomas J. Durrant revising the commissioner's draft.

CHAS. P. BARRETT, *Petitioner.*

Certificate of Counsel.

I certify that, in my judgment, the petition is well founded in law.

CHARLES C. LANCASTER.

Brief and Argument.

The extraordinarily grave consequences to their client, himself a member of the legal profession for the past quarter of a century, his *all* being imperiled—his honor, his liberty, his property, and his life itself, since there is little prospect of his living but a brief period in prison—furnish one cause for the constancy and zeal exhibited in his behalf. But while it is one, it is not the sole cause. *The main inspiring reason is the unquestionable incorrectness, in point of law, of the judgments against him holding that South Carolina composes "but one district, containing two divisions.* This is the conclusion after the most earnest, dispassionate, and protracted study of the subject, and in the light, both of the brief of counsel for the Government and the opinion announced by the learned Chief Jus-

tice. Without desiring to seem dogmatic, there is not and cannot be a shadow of doubt in regard to it by one who has mastered the subject.

The views of petitioner's counsel are not singular. Far otherwise. While there is no dissenting opinion, it is indisputable that the vote on affirming the judgments was not unanimous. The records and briefs show that in 1896 Mr. Judson Harmon, then United States Attorney General, in an official opinion, not only declared that South Carolina constituted two districts, but asserted that Section 546, United States Revised Statutes, which he cited as his authority, had not been repealed by subsequent legislation. And right here it will be observed that said Section 546 is the statute upon which the court based its opinion that there was but one district. Senator McLaurin, formerly Attorney General of that State, Senator Hoar—and in fact the whole of the United States Senate—concurred in that view. So did such eminent lawyers as Culberson, Bailey, *et al.* in the House. And it will be remembered that Assistant Attorney General Boyd, in his oral argument before the court, January 21, 1898, in reply to a question propounded to him by Mr. Justice Gray, conceded that there were two districts, but contended that the circuit court had jurisdiction over both.

In what way can the Government be damnified by a rehearing? None whatever. Hence, in view of the circumstances, would it not tend to promote justice by granting it where the matter can be reargued before a full bench—Mr. Justice McKenna took no part before—and where counsel on each side can again be heard? To do otherwise might, as all will admit, work injustice. And at the rehearing, if no error has been committed, the judgments can be affirmed. This court possesses plenary power in the premises and can continue it over till the next term—only about four months hence—or pass any other order to meet its views of propriety and justice. If this is done, of conrse, a re call of the mandate will be necessary and a motion is hereby made for that purpose.

It goes without saying that counsel for petitioner would not have filed this application had a vestige of a doubt been entertained respecting their contention.

CHARLES C. LANCASTER, *Counsel for Petitioner.*,
JOHN L. McLAURIN, *Counsel for Petitioner.*